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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

[redacted] No. 769

TOM E. RODGERS,

Petitioner,

—against—

BALTIMORE & OHIO RAILROAD CO.,

Respondent.

ON PETITION TO REHEAR PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Justices of the Supreme Court of the United States:

Petitioner respectfully petitions this court to rehear his petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit, pursuant to subparagraph 2 of Supreme Court Rule 58, the said petition having been denied on February 24th, 1964.

The petition herein is predicated on the following substantial grounds not previously presented:

The decision hereinafter set forth in *Hertel, infra*, did not constitute any basis for the original petition.

The Second Circuit affirmed the District Court's finding that petitioner's injury was within the coverage of the Longshoremen's and Harbor Workers' Compensation Act. Denial of certiorari establishes that finding as the law of the case, so that it is now conclusively established that petitioner's injury was within the admiralty jurisdiction rather than under FELA jurisdiction, as contended heretofore by petitioner.

Since petitioner's work status was that of loading respondent's vessel, a cartboat having no other crew-members, petitioner was, therefore, a crew-member of the said vessel and, as such, entitled to the benefits of the warranty of seaworthiness.

Even assuming, *arguendo*, petitioner's status was that of a longshoreman loading respondent's vessel, the January 3, 1964, decision of the U. S. District Court for the Southern District of New York (Hon. EDWARD WEINFELD, D. J.) in *Hertel* v. *American Export Lines, Inc.*, 225 F. S. 703, establishes that petitioner may rely on the warranty of seaworthiness for his remedy and is not restricted to the exclusive provisions of the LHWCA.

Hertel, supra, further establishes that petitioner's remedy may be either *in rem* or *in personam* on the civil side of the court (at p. 704 of 225 F. S.).

Hertel, as herein, involved a longshoreman, injured aboard a vessel owned by his employer (p. 703 of 225 F. S.), who sued for breach of warranty of seaworthiness and under the Jones Act.

The employer-shipowner in *Hertel* interposed an affirmative defense of LHWCA coverage.

The District Court granted *Hertel's* motion to strike this affirmative defense (pp. 703-704 of 225 F. S.), relying on *Reed* v. *Yaka*, 373 U. S. 410.

Similarly, in *Weyerhauser S.S. Co. v. U. S.*, 372 U. S. 597, this court declined to permit the LHWCA to decrease the admiralty jurisdiction.

This court has held that an appellate court may properly grant whatever relief is appropriate without relegating the parties to a collateral proceeding.

Bartone v. United States (Decided Oct. 28, 1963), ——— U. S. ———, 84 S. Ct. 21, 23.

To the same effect, see *Horton v. Moore McCormack* (Decided Jan. 7, 1964; 2nd Cir.), ——— F. 2d———.

WHEREFORE petitioner respectfully prays for rehearing of his petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit and further prays that, on such rehearing, this court will grant the writ.

Respectfully submitted,

JACOB RASSNER,
Counsel for Petitioner.

Certificate

The undersigned certifies that this petition is not made for the purpose of delay, that it is restricted to the purposes set forth in Supreme Court Rule 58 and it is presented in good faith.

JACOB RASSNER,
Counsel for Petitioner.